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ORIGINAL
NO. 87-555

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

Supreme Court, U.S.

FILED

OCT 26 1987

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SUPREME COURT, U.S.

THE STATE OF OHIO,

Petitioner,

vs.

BILLY ROGERS,

Respondent.

On Writ of Certiorari To
The Supreme Court of Ohio

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

On Question No. I

Retroactive Effect Was Properly Given to the Wainwright v. Greenfield Ruling.

In arguing that the ruling in Wainwright v. Greenfield, 474 U.S. ___, 88 L. Ed. 2d 623 (1986), should not have been retroactively applied by the Ohio Supreme Court to this case, Petitioner ignores this Court's recent pronouncement on retroactivity in Griffith v. Kentucky, 479 U.S. ___, 93 L. Ed. 2d 649 (1987).

Griffith held that a new rule for the conduct of criminal prosecutions applies retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.

This case was pending on direct review at the time the Greenfield ruling was announced.

Respondent had been convicted of aggravated murder and sentenced to death on October 29, 1982 (App. A125). The judgment and sentence was affirmed by the Court of Appeals (App. A123) and by the Supreme Court of Ohio. 17 Ohio St. 3d 174 (1985), (App. A59.) This Court granted Respondent's petition for a writ of certiorari on December 2, 1985, and remanded the case for "further consideration in light of Caldwell v. Mississippi, 472 U.S. 320 (1985)." 474 U.S. 1002 (1985), (App. A30.) The Greenfield decision was released six weeks later on January 14, 1986.

On the announcement of Greenfield, Respondent moved the Ohio court to expand the scope of its review on remand to include consideration of the effect of that ruling. Although the motion was granted, the court in its subsequent decision declined to address the issue on its merits. 28 Ohio St. 3d 427, 434 (1986), (App. A24-25.) Respondent's motion for rehearing was denied, but about three months later, on its own motion, the

court returned this case to its docket "in order [to] give proper consideration to the effect that Wainwright v. Greenfield may have upon this case". (App. All.) In its subsequent decision, announced August 12, 1987, the court held that the Greenfield ruling was controlling and in an unanimous opinion reversed its earlier judgment. 32 Ohio St. 3d 70 (1987), (App. Al.)

The Supreme Court of Ohio commenced this latest opinion by reciting that the case was on "Appeal from the Court of Appeals for Lucas County," a clear indication that the court regarded the case as coming before it from the lower court on direct review. Ibid. Under the Griffith holding, retroactive application of the Greenfield ruling was proper. Petitioner's Question No. I, therefore, does not present a substantial federal question for review by this Court.

On Question No. II

This Is Not a Federal Question.

Question No. II is not a federal question cognizable by this Court on a writ of certiorari. It is merely an assertion that the Supreme Court of Ohio erred in failing to view Petitioner's use of Respondent's silence to discredit his defense of insanity as harmless error. Petitioner's argument offers no special and important reasons for the Court to accept this question for review. Title 28, Section 1257(3), United States Code; Rule 17.1, Rules of the Supreme Court of the United States.

On Question No. III

This Is Not a Federal Question.

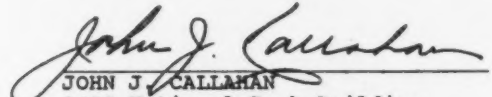
Question No. III also is not a federal question warranting review by this Court, but simply a claim that the Supreme Court of Ohio applied the Greenfield ruling to an inappropriate "fact

situation." Again, no special and important reasons for review are urged. Title 28, Section 1257(3), United States Code; Rule 17.1, Rules of the Supreme Court of the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,


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